11/-

IN THE HIGH COURT OF AUSTRALIA

ESANDA LIMITED

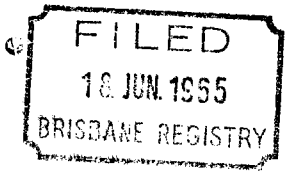
V.

ROBERT'S QUEENSLAND PTY.LIMITED

ORIGINAL

REASONS FOR JUDGMENT

11/- Per Copy.



Judgment delivered at BRISBANE

on FRIDAY 18th JUNE, 1965

A. C. Brooks, Government Printer, Melbourne
C.7639/60

ESANDA LIMITED

v.

ROBERT'S QUEENSLAND PTY. LIMITED

ORDER

Appeal dismissed with costs.

ESANDA LIMITED

v.

ROBERT'S QUEENSLAND PTY. LTD.

JUDGMENT

BARWICK C.J.
KITTO J.
TAYLOR J.

ESANDA LIMITED

v.

ROBERT'S QUEENSLAND PTY. LTD.

In an action for damages for the breach of a warranty that a stone crushing machine was fit for a specific purpose the plaintiff, the present respondent, obtained judgment against the appellant for £27,889.15. 6. This amount represented an actual out-of-pocket loss of £15,889.15. 6 incurred by the respondent and the sum of £12,000 for the profit which it was estimated the respondent would have made in carrying out a contract with the Commonwealth, the nature and terms of which were made known to the appellants, if the machine had been as warranted. An appeal to this Court by the present appellant was partially successful and a new trial limited to the issue of damages was directed (37 A.L.J.R. 289). The reason why a new trial was directed was because it did not appear how the learned trial judge had estimated the profit which it was probable that the respondent would have earned if there had been no breach of warranty and the respondent's contract with the Commonwealth had been carried to completion. Further it was not shown on the appeal that the estimate of £12,000 was justified upon the evidence.

The new trial has now taken place and it has resulted in judgment for the present respondent for £26,889. 15. 6, that is to say, £1,000 less than the judgment originally entered. This amount represents £15,889.15. 6 being the proved out-of-pocket loss of the respondent and the sum of £11,000 in substitution for the sum of £12,000 originally assessed as profit which it was probable the respondent would have made out of his contract if the warranty had been satisfied. As was the case in the earlier appeal there is no criticism of the former sum and, again, the basis of the

appellant's submissions is criticism of the manner in which the second figure was assessed. However it is criticism which is directed only to matters which lie within a very small compass.

In order to equip itself with a stone crushing machine the respondent entered into a hire purchase agreement with the appellant under which it would have been required to pay, in all, an amount of £9,668 if the hire purchase agreement had continued in full force and effect. The performance of the respondent's contract with the Commonwealth would, it was estimated, have taken some four months if it had been equipped with a suitable machine and for the purpose of estimating the respondent's probable profit, if that contract had been performed, his Honour took into account an amount for the depreciation of the machine at the rate of fifteen per cent per annum, that is to say a sum of £483. However it is the appellant's contention that the whole of the amount of £9,668 should be set off against what would have been received by the respondent if he had completed his contract with the Commonwealth. Alternatively, it is contended that one-half of this sum should be set off.

The appellant seeks to support the first contention by reference to the basis upon which the plaintiff had prepared its successful tender and evidence given in relation thereto and by the submission that upon the evidence the crushing machine would have had no residual value if and when the contract work had been carried out. We think that the first basis of this submission is without substance and, as regards the second, that there is no evidence to support the suggestion that a suitable machine would have had no residual value after operating for a period of only four months. We think there is ample evidence that a suitable crushing machine would have had a long life and

that such a machine would have had a substantial residual value at the expiration of the contract. Further there was evidence, which his Honour accepted, justifying the assessment of probable profit by setting off depreciation calculated at the rate of fifteen per cent per annum rather than by setting off the whole or any part of the capital cost of a suitable machine.

The alternative submission was based upon evidence which went to show that, after the respondent had obtained the contract with the Commonwealth, it had approached one, Kleinschmidt, to assist it both financially and technically in obtaining a suitable machine for the performance of the contract, and in that performance. Kleinschmidt agreed to do so, but stipulated as a condition of his assistance that, as well as the payment of a fee for his technical advice, he and the respondent should become partners in any further contracts in the performance of which the machine should be used and that, at times when the machine might be idle between contracts, it should be employed in Kleinschmidt's quarry in crushing spalls, presumably without recompense to the respondent.

The appellant claimed that on this material it should be held that the respondent had disposed to Kleinschmidt of a one-half interest in the machine, and that the value of that one-half interest was one-half of its initial capital cost. It contended that, because the respondent had purchased the machine expressly for the performance of the contract and had no other current use for it, the amount of that value was a cost of the performance of the contract which should be included in the outgoings in making any estimate of the probable profit the respondent would have derived from that performance.

It is, we think, sufficient to say that the evidence does not bear out this submission by the appellant.

It does not provide any ground for concluding that the respondent had bartered a one-half interest in the machine as the price or part of the price of Kleinschmidt's service. The proper conclusion is that, as part of its financial arrangements to place itself in a position to buy a suitable machine, the respondent agreed to go into partnership with Kleinschmidt in future ventures requiring the use of such a machine and to employ the machine in such ventures. Such a conclusion clearly does not warrant the inclusion in the outgoings in the performance of the contract of any part of the capital cost of the machine beyond a proper amount of depreciation in respect of its use in that performance.

The remaining objection is concerned with an amount of £282. This was the amount of the expenditure incurred by the respondent in transporting the crushing machine from Sydney to Brisbane and it was an amount which was taken into account in calculating the respondent's actual out-of-pocket loss. The appellant contends that this amount should have been set off against the amount which the respondent would have received if he had completed his contract with the Commonwealth. No doubt this contention is based upon the proposition that the cost of transport from Sydney to Brisbane represented part of the capital cost of the machine to the respondent but if it were so treated it would, on the views already expressed by us, have resulted in a slight increase in the amount which was allowed by his Honour for depreciation. The increase would have been to the extent of approximately £14 and this, we think, is more than compensated for by the margin which his Honour allowed in adjusting the estimate which appears on Exhibit No. 2. The probable profit according to that exhibit, which his Honour in the main accepted, was £13,722 and after making comparatively minor adjustments to which his Honour made reference, he deducted a further sum of £2,000 for contingencies. We do

not suggest that this allowance was made with this item in mind but it was a generous allowance made in favour of the appellant and, in the circumstances, we do not think that any further adjustment of his Honour's figures is required. That being so the appeal should be dismissed.